(2)

No. 90-685

In the

Supreme Court of the United States

October Term, 1990

ROBERT N. ALDAY, individually and on behalf
of all participants in the Container Corporation of America
Salaried Retiree Health Insurance program
as of December 31, 1986,
Petitioner,

v.

CONTAINER CORPORATION OF AMERICA,
THE JEFFERSON SMURFIT CORPORATION,
and SMURFIT PENSION AND INSURANCE SERVICES COMPANY,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Columbus R. Gangemi, Jr.
(Counsel of Record)
Kathleen M. Binnig
William G. Miossi

WINSTON & STRAWN
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600

Counsel for Respondents

QUESTIONS PRESENTED FOR REVIEW

1) Whether *Firestone Tire & Rubber Co. v. Bruch*, ___ U.S. ___, 109 S. Ct. 948 (1989), requires reversal of the decision in this case, as allegedly contrary to pre-ERISA law.

2) Whether promissory estoppel is available at federal common law to alter the terms of clear and unambiguous formal plan documents which, under ERISA, can only be created, maintained and amended in writing.

3) Whether Petitioner has stated a claim for promissory estoppel under the undisputed facts of this case.

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STATEMENT OF THE CASE

(i) Course of Proceedings and Dispositions Below:

This action was brought by Petitioner, Robert N. Alday, a salaried retiree and former plant general manager of Container Corporation of America ("CCA"), against Respondents, CCA, Jefferson Smurfit Corporation ("JSC"), and Smurfit Pension and Insurance Services Company ("Smurfit Pension"),[1] alleging that the actions taken by Respondents, effective January 1, 1987, modifying the benefits and premiums of the CCA salaried retiree medical insurance plan ("Plan") were improper and should be set aside. R1-1. Petitioner brought this action on behalf of himself and a proposed class consisting of all CCA salaried retirees who were participating in the Plan at the time of the changes, i.e, prior to January 1, 1987. R1-1. By order dated September 2, 1988, the district court certified for class treatment two of the three alleged common issues raised in paragraph 7 of the Complaint. R2-52.[2]

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1 In accordance with this Court's Rules 24.1(b) and 29.1, Respondents state that the parties to the proceeding in the Eleventh Circuit are those in the caption of the case in this Court. Respondents further state that Smurfit Newsprint Corporation is a non-wholly owned subsidiary of Jefferson Smurfit Corporation. The parents of Jefferson Smurfit Corporation are Jefferson Smurfit Group plc, an Irish company, and The Morgan Stanley Leveraged Equity Fund, II, L.P.

2 The court held that the third issue raised by Petitioner in his original Complaint - whether the plan modifications were contrary to certain understandings or beliefs held by himself and the proposed class members - was not appropriate for class action treatment. R2-52-6. Subsequent to the issuance of the court's order, but apparently prior to its receipt, Petitioner added a new

Summary judgment was granted in favor of Respondents by order and final judgment dated May 22, 1989. R5-110, R5-111. Petitioner appealed this decision to the Eleventh Circuit. On July 24, 1990, the Eleventh Circuit affirmed the district court's order granting summary judgment in favor of Respondents. A petition for rehearing was denied by the Eleventh Circuit on September 19, 1990.

(ii) Statement of the Facts

While the Statement of Facts submitted by Petitioner is not inaccurate, it is substantially incomplete. The courts below in significant part predicated their resolution of the legal issues presented on the unique facts out of which this case arose. Accordingly, to enable this Court to evaluate properly the instant Petition, Respondents supplement the facts as follows:

In 1964, CCA unilaterally established a program of medical insurance for its retirees. Originally, the plan covered all CCA retirees but provided only certain scheduled benefits. For example, the maximum hospital daily benefit was only $12.00 and the maximum surgical expense benefit was only $200.00. R3-67 - Ex. 1A at 7. The old 1964 insurance plan booklet distributed to eligible retirees expressly informed them that the plan "benefits will be provided to eligible retired employees without cost to them." *Id.* Dependent coverage was made

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Count II to his Complaint in which he alleged that Respondents were estopped from altering the terms of the Plan in a manner contrary to these understandings. R3-54 - 11,12. The new Count II is equivalent to the one which the court had already determined to be individual in nature, because it is based on the same alleged expectations of plan participants derived from unspecified representations which the court had already held lacked commonality. R2-52-6.

available at a "nominal" cost of $6.83 per month. Notably, that dependent premium amount was expressly set forth in the plan booklet.

Furthermore, the 1964 plan contained *no* express termination provision stating that it could be cancelled, modified, or amended at any time.[3]

CCA made no significant changes to this program until 1976. At that time a much more comprehensive and otherwise considerably different program of retiree health benefits was announced by CCA. Again, this new benefit program was unilaterally instituted by CCA management. R3-67 - Ex. 1 at 2. This new CCA salaried retiree medical insurance plan, however, differed from the first one in that, for the first time, retirees who elected coverage under the Plan were required to pay for part of the cost of their own coverage, as well as for the coverage of their eligible dependents. The new Plan was announced by a letter and attached "Highlights" memorandum to all retirees,[4] from then Chairman and Chief Executive Officer Henry Van der Eb. The retiree costs announced by Van der Eb in 1975 were as follows:

	Each Person Not Eligible Under Medicare (-65)	**Each Person Eligible Under Medicare (65+)**
Monthly Contributions	$20.00 (individual) $20.00 (dependent)	$8.00 (individual) $8.00 (dependent)

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3 As a consequence, when this plan was replaced in 1976, retirees were given the option of keeping this old plan, although, to our knowledge, only a few did so.

4 This letter and memorandum were apparently also sent to all the active CCA managers, such as Petitioner Alday, and the memorandum or later updated versions of it were sent thereafter to prospective retirees. R5-105-37 to 42, Ex. 20; R5-107-44 to 45.

The Highlights memorandum also stated that:

> There is every expectation that your contribution and the Company's contributions will be adequate to cover the long term cost of the Plan. However, contributions are based on the Plan's expected costs and may change in the future. In the event the cost does increase at some future date, you will, of course, have the choice of continuing in the Plan at the new cost or cancelling your coverage.

R3-67 - Ex. 1B.

With the passage of the Employee Retirement Income Security Act ("ERISA") in 1974, all welfare benefit plans were required to be in writing. 29 U.S.C. § 1102(a)(1)(1982). Although ERISA recognized that every employee could not be given the often lengthy formal plan document, it required that the terms of the plans be communicated to employees by means of documents called "summary plan descriptions" ("SPDs"). The new CCA plan's descriptive booklet, or SPD, differed from the booklets for the old plan issued from 1964 through 1976 in several key respects. First, the new SPD did *not* specify any particular retiree or dependent premium dollar amounts. Rather, the Schedule of Benefits provided only:

> "III. Contribution - as required by the Plan."

R3-67 - Ex. 1D at 4.

Second, the SPD for this new Plan also expressly provided that CCA could modify or terminate the Plan in the future. Thus, the section "*When Your Insurance Terminates*" stated:

> Your insurance under this plan will terminate at the earliest time stated below:
>
> 1. When you cease to be a Retired Employee (as defined).
>
> 2. When this Plan is discontinued ...

R3-67 - Ex. 1D at 18. Likewise, paragraph 7, entitled "*Plan Termination,*" provided:

> The right is reserved in the Plan for the Plan Administrator to terminate, suspend, withdraw, amend or modify the Plan in whole or in part at any time, subject to the applicable provisions of the group insurance policy(ies).

R3-67 - Ex. 1D at 24.

Over the next ten years, CCA periodically modified the Plan in accordance with the reservation of rights clause in the Plan Termination section of the SPD. Though generally such changes entailed expansion of policy benefits, there were contractions also. R3-67 - Ex. 1 at 8; R3-67 - Ex. 2 at 4.

As was true of the original 1976 SPD, none of these subsequent SPDs specified any stated or set retiree premium amount or promised any particular allocation of cost or burden. On the contrary, for example, the 1986 SPD, in existence immediately before the changes at issue herein, provided:

> Who Pays for the Insurance - The Health Insurance under this Plan is on a contributory basis requiring contributions from you towards its cost.

R3-67 - Ex. 1F at 6. No retiree premium amount or "contribution" was specified. Further, it stated that:

> [t]he Employee's contribution is a fixed monthly rate as determined from time to time.

R3-67 - Ex. 1F at 29.

In addition, the Plan termination language from the 1976 SPD was carried over into each successive SPD. R3-67 - Ex. 1F at 30.

Commencing in 1977 or 1978, CCA provided annually to each of its active salaried employees a booklet entitled "Summary of Personal Benefits." R3-67 - Ex. 1G. The Summary of Personal Benefits booklet was a thirteen-page computer generated document that did *not* concern or describe the retiree medical benefits plan. Instead, it provided an individualized calculation of the pension and stock bonus plan accruals earned by the employee to date. It also made passing references to the dental, long-term disability insurance and life insurance plans, as well as Social Security, vacation time and paid holidays. *Id.*

The Summary of Personal Benefits booklet made a single reference to health insurance after retirement:

Event	**Health and Dental Plans**
You retire	Health insurance available to you and your dependents at a modest cost. Dental coverage ends.

R3-67 - Ex. 1G at 6. The booklet stated no other details about the Plan.

When a salaried employee neared his/her Normal Retirement Date under the pension plan (age 65) or requested an early retirement, CCA issued a standard form letter, accompanied by pension forms to be completed by the employee. R3-67 - Ex. 1 at 5-6. The letter advised the prospective retiree of a number of elections to be made and forms to be submitted in connection with retirement. Optional forms of pension payments needed to be selected. Life insurance could be converted. The employee was informed that the Stock Bonus Plan was distributable soon after retirement and was reminded that various active employee insurances ceased upon retirement. R5-106 - Ex. 10. The letter also advised the prospective retiree that he should apply for Medicare health care coverage one month before reaching age 65. The letter also quoted the then-current retiree premium charged for the CCA-offered retiree medical

or Medicare-supplemental coverage. For example, the letter sent to Petitioner Alday stated:

> A plan of health insurance benefits is available to you as a retiree through the company. The charge for this coverage for you is $20.00 per month, deductible from your monthly pension check.
>
> * * *
>
> [After age 65] [a] plan of health insurance benefits to supplement Medicare is also available through the company at a cost of $8.00 per month for you and $8.00 per month for your spouse.

R5-106 - Ex. 10; R3-54-8.

A copy of the current SPD for the retiree medical insurance plan accompanied by a retiree medical insurance enrollment card was sent to the prospective retiree shortly after this letter.[5] R3-67 - Ex. 1 at 5-6.

The enrollment card that was to be signed by the retiree and returned to the company provided for no particular premium contribution. Instead, it stated that employees would pay "the required contributions." R3-67 - Ex. 5H.

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5 Contrary to Petitioner's assertion (Petition at 22), the retiree health plan was not part of any employee benefits package held out to applicants or employees in consideration for their employment. Unlike the pension benefit which an employee accrues during his working life and, once vested, has a proprietary interest in, employees had no proprietary interest in or need to know about the medical insurance plan available for purchase upon retirement. Therefore, information about the plan was not given out to employees, unless specifically requested, until the time of their retirement. R7-107-52, 53, 56.

Beginning in 1985, a series of pre-retirement seminars was conducted for some CCA salaried employees nearing retirement. At these seminars, a set of visual projections was utilized and also copied and distributed to the seminar participants. R3-67-Ex. 1H. This handout included general information on retirement income, investment planning, benefits and income tax considerations. These documents did not specify a retiree medical premium amount, but stated only "Contribution Required." *Id.*

The cost of the CCA retiree medical insurance increased throughout the late 1970's and continued to escalate during the 1980's, as did the cost of health insurance nationally. R3-67 - Ex. 1C. At the same time, the number of CCA retirees was also increasing. R2-46 - Ex. 2.

By the mid-1980's, the cumulative weight of these increases began to command attention.[6] Moreover, the increases became more dramatic. Consequently, for example, between late 1983 and 1986, the cost of the CCA salaried under-65 retiree medical coverage increased 100% to $88.80 per month — it doubled in a little over two years. R3-67 - Ex. 1C.

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6 From 1977 to 1985, the total cost of the CCA under age 65 salaried retiree coverage jumped 327%, from $24.10 per month to $103.00 per month. The over age 65 costs likewise rose 260%, from $9.01 per month to $32.40 per month. R3-67 - Ex. 1C. Put differently, when CCA originally announced its retiree medical benefit plan in 1976, no particular percentage of cost was announced as payable by the retiree or the Company. Retirees at that time were, in fact, paying over 80 percent of the cost of coverage. By 1986, costs had risen to such an extent that the retirees were paying approximately only 20 percent. *Id.*

Effective January 1, 1987, Jefferson Smurfit Corporation ("JSC")[7] and CCA announced that they were placing all JSC and CCA active and retiree health insurance administration with Aetna, JSC's carrier for over 20 years, and that certain changes would be made to the insurance plans. R3-67 - Ex. 3 at 2-3. CCA salaried retirees were also advised that they, like JSC retirees,[8] would have to bear a greater share of the cost of the retiree medical insurance.[9]

SUMMARY OF THE ARGUMENT

The case at bar offers no special or important reason for a grant of the proposed writ of certiorari to the United States Court of Appeals for the Eleventh Circuit. The decision of that court, and its reasons therefor, are highly fact specific. Contrary to Petitioner's contentions, it represents no divergence from the pronouncements of this Court, nor does it create any conflict with the decisions of other circuits.

The decision of this Court in *Firestone Tire & Rubber Co. v. Bruch*, __ U.S. __, 109 S.Ct. 948 (1989), simply does not

7 JSC purchased the stock of CCA in the latter part of 1986 in a joint venture with Morgan Stanley Leveraged Equity Fund, L.P.

8 At the time of the acquisition, unlike CCA, JSC's retirees were bearing a substantially greater share — in fact, in some cases, virtually *all* — of the cost of their medical insurance. In addition, hourly JSC retirees, except in a few cases, had no group health insurance even offered through the company at any cost. R3-67 - Ex. 3 at 2.

9 Specifically, all CCA and all post-1/1/87 JSC under 65 retirees were charged a premium of $56.21 for themselves and $92.45 for dependent coverage, while over 65 retirees were charged $54.81 and $54.81, respectively.

stand for the proposition for which Petitioner offers it. Petitioner contends that *Bruch* mandates a federal common law whereunder welfare benefit plans applicable to retirees should be considered vested because, allegedly, pre-ERISA state common law provided as much.

This argument fails in two respects. First, pre-ERISA common law did not uniformly so hold.

Second, and of greater importance, regardless of what the common law held, Congress deliberately and purposefully made clear that, under the "comprehensive and reticulated" statutory scheme of ERISA, welfare benefit plans, unlike pension benefit plans, are not considered vested unless the benefit plan so provides by its terms.

As for Petitioner's other basis for his petition, no federal court of appeals has held that promissory estoppel, through alleged oral representations or informal writings, can operate to amend the terms of an *unambiguous* employee benefit plan. Such plan documents are expressly required by ERISA and are to be created and maintained in writing and modified *only* by formal written amendment of their terms in accordance with applicable federal statutory prescriptions.

The Eleventh and other circuits have permitted claims of promissory or equitable estoppel in cases of fraud or where unclear or ambiguous plan provisions have been the subject of interpretations or promises by persons in authority to participants, who, in turn, relied thereon to their detriment. No such facts are pleaded or presented in this case. The district court and the court of appeals both found the CCA retireee medical benefit plan to be explicit and unambiguous in its reservation of right "to terminate suspend, withdraw, amend or modify the Plan in whole or in part at any time..."

In any event, both courts below also found, in the alternative, that, even if promissory estoppel was available under the

facts in this case, Petitioner had failed to state a claim therefor. Therefore, Petitioner's arguments on this issue are moot.

ARGUMENT

I. THIS COURT'S DECISION IN *FIRESTONE TIRE & RUBBER CO.v. BRUCH* HAS NO BEARING ON THE ISSUES PRESENTED IN THIS CASE, AND, THUS, PROVIDES NO BASIS BY WHICH TO INVOKE THE COURT'S DISCRETIONARY REVIEW

Retiree medical insurance plans, such as the one at issue here, are welfare benefit plans covered by ERISA. 29 U.S.C. § 1002(1). Unlike pension plans, however, welfare benefit plans are not covered by ERISA's vesting, minimum funding, and benefit accrual requirements. It is quite clear, moreover, that the omission of any vesting requirements for welfare benefit plans reflected a conscious, deliberate policy choice by Congress, necessitated by the differences between pension plans and welfare plans in terms of how they are funded by the employer and the functions which they serve. *See, e.g.*, H.R. Rep. No. 807, 93d Cong., 2d Sess. 15, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4670, 4726; S. Rep. No. 383, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4890, 4935. *See also Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1160 (3d Cir. 1990).

As this Court has observed, judicial intervention to infer a vested right in a welfare plan has been recognized as particularly inappropriate when viewed in the context of a "comprehensive and reticulated" statute such as ERISA. *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980); *see also Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134,146-47 (1985); *Van Orman v. American Ins. Co.*, 680 F.2d 301, 312 (3d Cir. 1982).

The congressional judgment to date to require the vesting of pension but not welfare benefits reflects "a finely tuned

balance between protecting pension benefits for employees while limiting the cost to employers." *A-T-O, Inc. v. Pension Benefit Guaranty Corp.*, 634 F.2d 1013, 1021 (6th Cir. 1980) (citations omitted); *accord Hozier*, 908 F.2d at 1160.[10]

Case law following the enactment of ERISA has recognized the distinction between welfare benefit plans and pension plans, and confirmed that an employee "can never accrue 'vested' rights to ... [welfare benefit plan] benefits under ERISA." *See Anderson v. Alpha Portland Indus.*, 836 F.2d 1512, 1516 (8th Cir. 1988); *accord Massachusetts v. Morash*, ___ U.S. ___, 109 S. Ct. 1668, 1675 (1989); *Hozier*, 908 F.2d 1155 (3d Cir. 1990); *Ryan v. Chromalloy American Corp.*, 877 F.2d 598, 603 (7th Cir. 1989); *Musto v. American Gen. Corp.*, 861 F.2d 897, 901 n.2 (6th Cir. 1988), *cert. denied*, 109 S.Ct. 1745 (1989); *Moore v. Metropolitan Life Ins. Co.*, 865 F.2d 488, 492 (2d Cir. 1988).

Accordingly, any retiree right to lifetime medical benefits can only be found if it is expressly established by contract under the terms of the ERISA-governed benefit plan document. *See, e.g., Moore*, 856 F.2d at 492; *Anderson v. John Morrell & Co.*, 830 F.2d 872, 876 (8th Cir. 1987); *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 612-15 (6th Cir. 1985), *cert. denied*,

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10 The need to take into account the burden on employers reflected not only the extreme expense involved in requiring vesting but also Congress' recognition that imposition of "overly burdensome" costs would be "self-defeating," since employers would respond by electing not to offer such plans at all. 120 Cong. Rec. 8702, *reprinted in*, 1974 U.S. Code Cong. & Admin. News 5166 (remarks of Rep. Al Ullman); *see also*, H.R. Rep. No. 807, 93d Cong., 2d Sess. 15, *reprinted in*, 1974 U.S. Code Cong. & Admin. News 4670, 4682.

475 U.S. 1017 (1986); *UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1479-83 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984).

In light of Congress' intent that ERISA fully occupy the field of employee benefit plans, *see Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981), its deliberate reluctance to impose the vesting of medical benefit plans on employers, and the compelling reasons therefor, in addition to Congress' continuing study of the issue, no court should lightly infer the existence of a contractual obligation to this effect, absent a clear and definite statement of such a contractual undertaking. *See Hozier*, 908 F.2d at 1162; *Alpha Portland*, 836 F.2d at 1516-17.

Petitioner attempts an "end run" around this line of authority. He enlists *Firestone Tire and Rubber Co. v. Bruch*, __ U.S. __, 109 S.Ct. 948 (1989) ("*Bruch*"), to do his blocking and open the way for a return to what Petitioner claims was the pre-ERISA common law on vesting of retiree health benefits. Yet, in this case, *Bruch* is not even suited up to play.

The *Bruch* decision concerned only the judicial standard of review under section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), applicable to a fiduciary's decision to deny a plan participant's request for a severance benefit. *See Bruch*, 109 S. Ct. at 953. In that case, this Court held that generally a *de novo* standard of review is to be applied to such a decision. This Court emphasized that its holding "is limited to the appropriate standard of review in § 1132(a)(1)(B) actions challenging denials of benefits based on plan interpretations." 109 S. Ct. at 953.[11]

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11 This case raises no issue with regard to the denial of benefits or the administration of a benefit plan, much less Respondents' role as fiduciaries in interpreting and applying plan terms. Here, the issues concern only Respondents' actions in modifying the terms

Nothing in *Bruch* can be read to signal the abandonment of the established distinction between an employer's role as fiduciary in the administration of a plan and an employer's role as settlor of such plans when making business decisions as to what benefits to provide.

Ultimately, Petitioner proffers *Bruch* for the truly revolutionary proposition that Congress meant to establish pre-ERISA common law as a substantive floor for federal courts in interpreting and applying ERISA. Petitioner attempts to show that had his claims arisen prior to ERISA's enactment, he "would have been entitled to recover" because pre-ERISA law "held that the right to such health insurance retiree benefits was a vested right once the employee retired." Petition at 22.

This position is fatally flawed in at least two respects: 1) no reading of *Bruch* suggests a return to pre-ERISA common law; and 2) even under pre-ERISA law, Petitioner would not have been entitled to recover on his claims based upon the undisputed facts of this case.

Petitioner appears to hinge the proposition that pre-ERISA law should control here on the *Bruch* opinion's choice of the

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of the retiree medical insurance plan, *not* the administration of that plan. Virtually every circuit has held that an employer's decision to terminate one plan of benefits and substitute another less favorable plan and related decisions regarding plan design are *not* subject to review under the fiduciary standards of ERISA. *See, e.g., Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1161 (3d Cir. 1990) (and cases cited therein).

Nothing in *Bruch* can be read to signal the abandonment of the established distinction between an employer's role as fiduciary in the administration of a plan and an employer's role as settlor of such plans when making business decisions as to what benefits to provide.

pre-ERISA common trust law standard of *de novo* review where ERISA does not set its own standard of review for actions under Section 502(a)(1)(B) challenging benefit eligibility determinations. In so holding, the opinion made the observation that adoption of Firestone's reading of ERISA would require imposition of a standard of review that would afford less protection than employees enjoyed before ERISA was enacted. 109 S.Ct. at 956.

This observation, however, while worthy of consideration where ERISA is mute, does *not* state that such a result is impermissible under ERISA as a matter of congressional intent. This is particularly true where, as here, ERISA clearly establishes a statutory scheme different from the common law; health and welfare benefit plans, *unlike* pension plans, were *not* to be considered vested benefits. *See* 29 U.S.C. § 1051(1). *See also* 1974 U.S. Code Cong & Admin. News 4670, 4726; *Massachusetts v. Morash*, ____ U.S. ____, 109 S.Ct. 1668, 1675 (1989); *Howe v. Varity Corp.*, 896 F.2d 1107, 1109 (8th Cir. 1990). In this regard, as demonstrated herein, ERISA has most assuredly occupied the field, thereby displacing any contrary common law. *See In re White Farm Equipment Co.*, 788 F.2d 1186, 1192 (6th Cir. 1986) (criticizing lower court's reliance on pre-ERISA common law cases concerning benefits termination, which are superseded by ERISA"); *accord Anderson v. John Morrell & Co.*, 830 F.2d at 875.

Moreover, even were pre-ERISA common law to be applied here, it is not at all clear that Petitioner would have been entitled to recover. *See* Petition at 17-22. All the cases cited by Petitioner, with one exception, involve accrued pensions, *not* health or other welfare beenfits. A single Ohio case, *Sheehy v. Selion, Inc.*, 227 N.E. 2d 229 (Ohio 1967), does not fix pre-ERISA law as some uniform, constant object in the legal firmanent.

Pre-ERISA common law was not even clearly settled on the vesting issue in the case of pension plans. For instance, in *Boase v. Lee Rubber & Tire Corp.*, 437 F.2d 527, 532-34 (3d Cir. 1970), the court rejected the plaintiffs' claim for pension benefits as vested under an estoppel theory and, instead, enforced the clear, written terms of the pension plan which preserved the employer's right to modify or terminate the plan at any time, *despite* the existence of ancillary documents distributed to employees, supplemented by oral representations by company officers, that the pensions were payable for life. Here, there is *no* dispute that the Plan documents unambiguously reserved the right to CCA to change, modify or terminate the Plan at anytime, and Petitioner cannot point to a single ancillary document that even implies that retiree health insurance was payable for life.

The other pre-ERISA cases that Petitioner selectively offers as supporting his claim for recovery are at best inapposite. In *Rochester Corp. v. Rochester*, 450 F.2d 118 (4th Cir. 1971), the terms of the pension plan expressly gave employees a vested right after ten years' service and the plan did not reserve any right to modify or terminate -- unlike the welfare plan in this case. In *Hoefel v. Atlas Tack Corp.*, 581 F.2d 1 (1st Cir. 1978), another *pension* case, the court refused to give effect to a reservation of rights provision *because* it was ambiguous — again, unlike the undisputed facts, here.

Bruch just can not be read to stand for the proposition that wherever pre-ERISA case law once *might* have afforded plan participants greater protection, federal courts should intervene and systematically dismantle "ERISA's interlocking, interrelated and interdependent remedial scheme" in order to achieve whatever result favors the plan participants. *See Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. at 146. Consequently, this Court's decision in *Bruch* does not suggest any reason why

this Court should grant a writ of certiorari on this basis in this case.

II. THERE IS NO SPLIT IN THE CIRCUIT COURTS OF APPEAL REGARDING THE UNAVAILABILITY OF PROMISSORY ESTOPPEL UNDER ERISA TO ALTER THE TERMS OF AN UNAMBIGOUS ERISA PLAN DOCUMENT

Contrary to Petitioner's assertion, the federal courts of appeal are not split on the unavailability of promissory estoppel under ERISA in the common situation presented by the instant case. Other courts have followed the lead of the Eleventh Circuit in *Nachwalter v. Christie*, 805 F.2d 956 (11th Cir. 1986), in this regard. Virtually all courts that have directly considered the issue raised before the Eleventh Circuit in both *Nachwalter* and the instant case have agreed that there is no federal common law right to promissory estoppel under ERISA in cases involving alleged oral or informal written amendments to or modification of the unambiguous terms of employee welfare benefit plans governed by ERISA. This is because ERISA specifically regulates these situations by requiring that such plans be created, maintained and amended only in writing through ERISA-mandated and specified plan documents. *Nachwalter*, 805 F.2d at 960; *Alday*, 906 F.2d at 666.

In this regard, the *Nachwalter* decision has now been cited with approval by, and followed in cases of, the Fifth, Sixth, Second and Tenth Circuits. *See Cefalu v. B. F. Goodrich Co.*, 871 F.2d 1290, 1295-97 (5th Cir. 1989); *Musto v. Amer. Gen. Corp.*, 861 F.2d 897, 910 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 1745 (1989); *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2nd Cir. 1988); *Straub v. Western Union Telegraph Co.*, 851 F.2d 1262, 1265 (10th Cir. 1988) ("Following the lead of the Eleventh Circuit, we hold that no liability exists under

ERISA for purported oral modifications of the term of an employee benefit plan.").

In *Nachwalter*, a plan participant sought to establish an alleged oral modification to the terms of an ERISA pension plan and asked the court to estop the trustees from enforcing written terms contrary to rather explicit alleged oral representations. The Eleventh Circuit declined:

> A federal court may create federal common law based on a federal statute's preemption of an area only where the federal statute does not expressly address the issue . . .
>
> . . . ERISA expressly requires that employee benefit plans be "established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1). We agree with the district court that this requirement that ERISA plans be "maintained" in writing precludes oral modifications of the Plans; *the common law doctrine of estoppel cannot be used to alter that result.*

Nachwalter, 805 F.2d at 959-60 (citations omitted) (emphasis added). Though the alleged contrary representation at issue in *Nachwalter* was oral, the court also made clear that it understood Congress to have "expressly prohibited informal written amendments of ERISA plans." *Nachwalter*, 805 F.2d at 960. *Accord Cefalu v. B. F Goodrich Co.*, 871 F.2d at 1296-97.

In a retiree health insurance case which is factually very close to the instant lawsuit, a similar conclusion was reached by the Second Circuit in *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488 (2d Cir. 1988). The plaintiffs in *Moore*, apparently quite similarly to Petitioner Alday, were "driven to argue that the 'contract' between themselves and Metropolitan consists of

the totality of the representations made to the employees by the Company . . . ." *Id.* at 491.[12]

In rejecting plaintiff's reliance thereon, the court noted:

> Congress intended that plan documents and the SPDs exclusively govern an employer's obligations under ERISA plans. This intention was based on a sound rationale. *Were all communications between an employer and plan beneficiaries to be considered along with the SPDs as establishing the terms of a welfare plan, the plan documents and the SPDs would establish merely a floor for an employer's future obligations. Predictability as to the extent of future obligations would be lost, and consequently, substantial disincentives for even offering such plans would be created.*

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12 In *Moore*, Metropolitan maintained health insurance for its employees and later retirees for over seventy years. In 1984 and 1985, Metropolitan significantly raised the deductibles by more than 300% to $24 per person/$48 per family. Several Metropolitan group insurance booklets expressly reserved "the right at any time to change or discontinue" the plan. *Moore*, 856 F.2d at 490. Plaintiffs complained, however, that Metropolitan's communication programs, film strips and other benefit promotion materials, memoranda and letters did not mention this right of amendment. Moreover, these materials and presentations occasionally described the insurance and retirement benefits as "lifetime" or "at no cost." *Id.*

856 F.2d at 492 (*citing Nachwalter*, 805 F.2d at 960; other citations omitted) (emphasis added).[13]

Petitioner here concedes that these courts have squarely rejected the argument that promissory estoppel is available under ERISA to alter the terms of an unambiguous plan. Petition at 29-30. However, he asserts that other circuits have issued contrary holdings in an attempt to get this Court to grant

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13 Similarly, in *Musto*, also factually very close to this case, following a corporate acquisition, the successor employer changed the terms of the retiree medical insurance plan to require participants to contribute 50 percent of the total cost, instead of the old plan's requirement of 20 to 25 percent. Despite the existence of unambiguous plan language reserving the right to change or terminate the plan, plaintiffs argued that alleged oral representations to the contrary estopped the employer from relying on the reservation of rights language.

The Sixth Circuit rejected the plaintiffs' claim based upon alleged oral representations to prospective retirees that no changes would be made in the retiree medical insurance, stating:

> [W]e are quite certain that Congress, in passing ERISA, did not intend that participants in employee benefit plans should be left to the uncertainties of oral communications, in finding out precisely what rights they were given under the plan. That is why ERISA makes it mandatory that every plan be established and maintained under a "written instrument." 29 U.S.C. § 1102(a)(1).
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> * * *
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> . . . Other courts that have considered this Congressional policy have concluded that the clear terms of a written employee benefit plan may not be modified or superseded by oral undertakings on the part of the employer.

Musto, 861 F.2d at 909-10.

certiorari. However, the cases Petitioner cites on this issue simply do not support his assertion.

No issue of promissory estoppel was even presented in *Woodfork v. Marine Cooks and Stewards Union*, 642 F.2d 966 (5th Cir. 1981). Furthermore, as noted above, the same Fifth Circuit, in a much more recent case when it *did* address this issue, held that promissory estoppel is not generally available under ERISA. *Cefalu*, 871 F.2d at 1295-97. Petitioner also cites a number of decisions in the Sixth Circuit, *O'Grady v. Firestone Tire & Rubber Co.*, 635 F. Supp 81 (S.D. Ohio 1986), *International Union UAW v. Cadillac Malleable Iron Co.*, 728 F.2d 807 (6th Cir. 1984), and *UAW v. Park-Ohio Industries, Inc.*, 661 F. Supp. 1281 (N.D. Ohio 1987), among others, in support of his argument. However, without addressing the merits of his assertions regarding the holdings of these cases, Petitioner again ignores the fact that the Sixth Circuit's only specific consideration of the issue explicitly *rejected* Petitioner's promissory estoppel theory. *Musto*, 861 F.2d at 909-10.

Petitioner also cites a number of Labor Management Relations Act cases - cases which were not even brought under ERISA — in support of his argument. These decisions have no bearing on this issue as they interpret a completely different statutory scheme and frequently concern themselves with discerning the intent of the two parties to union contracts.

It is important to recognize here what Petitioner is requesting of this Court. The decisions discussed by Respondents above all stand for the proper conclusion that under ERISA an *unambiguous* employee benefit plan may not be *amended* by informal written or oral statements. ERISA's provisions are clear that these plans are to be developed, maintained and amended in writing in accordance with the terms of the plan. Promissory estoppel was denied here, as in *Musto* and *Moore supra*, because the alleged promises, which Petitioner sought to

assert, were directly contrary to the CCA plan. To hold otherwise would grievously undermine ERISA's statutory scheme.

To be sure, this precedent does *not* mean that promissory estoppel is unavailable in *all* circumstances under ERISA. Thus, for example, the Eleventh Circuit consistently has recognized that equitable promissory estoppel may be asserted in cases of intentional fraud or where specific contrary representations have been made to an employee concerning the interpretation of a plan which is ambiguous such that a reasonable person could disagree as to the plans' terms meaning or effect. *Alday*, 906 F.2d at 666; *Kane v. Aetna Life Ins.*, 893 F.2d 1283, 1285-86 (11th Cir. 1990). Likewise, other circuits have recognized the availability of promissory estoppel where specific representations were made about collateral matters, other than plan terms, upon which the employee reasonably relied to his detriment. *See, e.g., Black v. TIC Investment Corp.*, 900 F.2d 112 (7th Cir. 1990).[14]

Here, however, as the court of appeals noted, the plan documents were unambiguous in reserving to CCA the right to amend or terminate the plan, and no misrepresentation contrary to the plan provisions was ever allegedly made. Instead, Alday was complaining that collateral documents upon which he claimed to rely merely failed to include all the plan's language concerning CCA's right to modify or terminate the plan. Thus, simply put, Alday sought to edit out key unambiguous

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14 *Black v. TIC Investment Corp.*, 900 F.2d 112 (7th Cir. 1990), involved an employment termination notice directed to plaintiff Black advising him that over $18,000 in severance pay benefits "will be due and payable to you if and when the [bankruptcy courts] approve such payments." *Id.* at 113. Thereafter, defendant filed an objection in the bankruptcy court to the claim for severance on the ground that such welfare plans could be unilaterally terminated. The court found the specific promise of payment subject to court approval, upon which the plaintiff had

provisions of the plan because they were not contained in all documents and did not comport with his understanding.

III. EVEN IF PROMISSORY ESTOPPEL WERE AVAILABLE, THE COURTS BELOW PROPERLY HELD THAT PETITIONER ALDAY FAILED TO STATE A CLAIM FOR PROMISSORY ESTOPPEL

Even if ERISA common law were construed to permit effective plan modification under a promissory estoppel theory, Petitioner Alday was found by the district court not to state a claim therefor. The court found, in the alternative, that "these statements would not alter its determination as to defendant's obligation under the plan." *Alday*, No. 87-488-Civ-J-16, slip. op. at 17 n.1. (M.D. Fla. May 22, 1989). Similarly, the court of appeals observed that "none of the documents relied on by Alday in any way contradict the SPD." *Alday*, 906 F.2d at 666 n.15.

The prerequisites for recovery under the general common law doctrine of promissory estoppel are:

> (1) a clear and definite agreement, (2) proof that the party seeking to enforce the agreement reasonably relied upon it to his detriment, and (3) a finding that the equities support enforcement of the agreement.

Jungmann v. St. Regis Paper Co., 682 F.2d 195, 197 (8th Cir. 1982) (per curiam) (citations omitted). *See also Litman v. Massachusetts Mut. Life Ins. Co.*, 739 F.2d 1549, 1559 n.7 (11th Cir. 1984); *Santoni v. Federal Deposit Ins. Corp.*, 677 F.2d 174, 179 (1st Cir. 1982). In this case, the documents at issue as well

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relied to his detriment, binding. *Id.* at 116. It should be noted that while *Black* can be read to recognize a general availability of promissory estoppel under ERISA, under the facts and circumstances of that case, there is no disagreement between the circuits.

as Mr. Alday's own testimony simply did not establish these elements.[15]

Mr. Alday himself had no "understanding" or reliance at all about retiree medical insurance based on the form letter and other collateral materials cited, let alone an understanding sup-

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15 Here, Petitioner primarily relied upon one of the standard pre-retirement form letters which quoted current retiree health insurance contribution charges at $20 and $8. The form letter, however, did *not* say that insurance at tht cost would "perpetually" be available, was "vested" or never could or would go up.

The subject letter made no representation whatsoever about what the benefits and costs *would be*, let alone a clear and unambiguous promise. It merely recited what "*is*" the cost and what "*is* available." In short, it made no promise contrary to the Plan's explicit provisions concerning termination and modification. It offered no assurance contrary to CCA's statement when the Plan was initiated that premiums "may change in the future." *Accord, Petersen v. Grand Trunk Western R.R. Co.*, 683 F. Supp. 649, 651 (E.D. Mich. 1988)

Mr. Alday conceded that he understood as much when questioned about the retirement letter in his deposition:

Q. Is there any way, in that document, to your understanding, that you're promised that that cost might not go up in the future?

A. No. Nor is there anything in there that says it will.

* * *

Q. And you can't testify that this $8 or $20 can never change, the benefits can never change?

A. No.

R5-107-73, 80.

posedly common to the other 1000 salaried retirees.[16] On the contrary, Alday repeatedly conceded that he recognized that CCA could alter the plan and increase his premiums. R-5-107-47, 51, 80-82. No element of promissory estoppel is made out by his claim.

CONCLUSION

For all the foregoing reasons, the Petition does not state a basis upon which a proposed writ of certiorari should be granted. Respondents respectfully request that the Petition be denied.

Columbus R. Gangemi, Jr.
(Counsel of Record)
Kathleen M. Binnig
William G. Miossi

WINSTON & STRAWN
35 W. Wacker Drive
Chicago, Illinois 60601
(312) 558-5600

Counsel for Respondents

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16 In addition, unlike *Black v. TIC Investment Corp.*, 900 F.2d 112 (7th Cir. 1990), there is absolutely no evidence of detrimental reliance in this case, let alone evidence indicating that such reliance — even if it could be established — could be found "reasonable," given the plain language of the plan documents discussed above. *See Etherington v. Bankers Life & Casualty Co.*, No. 88 C 10963 (N.D. Ill. Aug. 29, 1990) (LEXIS, Genfed library, Newer file) (*construing Black*).